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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 405

JOHN L. LODWICK, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John L. Lodwick, Jr., prays that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit to review the opinion and judgment of that court in the case of United States of America, Appellee, v. John L. Lodwick, Jr., Appellant, No. 19,442, entered on May 22, 1969, affirming his convictions in the United States District Court for the Western District of Missouri on the first of a two count indictment on charges

of attempting to evade and defeat payment of federal income tax due and owing for the calendar year 1961 in violation of 26 U.S.C., Section 7201; and reversing the second count for allegedly subscribing to a verified declaration of income for the calendar year 1961 he did not believe to be true and correct in violation of 26 U.S.C., Section 7206 (1).

A timely Petition for Rehearing on count one was filed and overruled by the Court of Appeals on June 26, 1969

OPINION OF THE COURT OF APPEALS

The opinion and judgment of the Eighth Circuit Court of Appeals is reported in ..... F.2d ....., and appears in the Appendix to this Petition as Exhibit A, page A1.

Appellant's Petition for Rehearing appears in the Appendix to this Petition as Exhibit B, page A9.

The opinion and judgment of the Court of Appeals to be reviewed was entered on May 22, 1969.

Appellant's Petition for Rehearing was overruled on June 26, 1969. (Appendix, Ex. C, p. A19).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1254 (1) and Title 26, U.S.C.A., Sections 7201 and 7206 (1).

It is also invoked to determine whether the holding of the Court of Appeals in this case that in a circumstantial evidence criminal case as here (Opinion, Appendix, Ex. A, pp. A1-A8) it is no longer necessary to apply the test as to whether the jury might reasonably find that the evi-

dence excluded every reasonable hypothesis except that of guilt to test the sufficiency of the evidence to sustain a conviction is inconsistent with, and misconstrues, the opinion of this Court in the case of *Holland* v. *United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, and to resolve a widespread conflict among the Circuits on this important and recurring problem of criminal law.

C.I.R. v. *Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886; *United States* v. *Zacks*, 375 U.S. 59, 84 S.Ct. 178, 11 L.Ed.2d 128; *Pure Oil Company* v. *Suarez*, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474.

Jurisdiction is also invoked under the Fifth and Fourteenth Amendments to the Constitution of the United States, for punishing petitioner without evidence of his guilt, and compelling him to be a witness against himself, *Leary* v. *United States*, 89 S.Ct. 1532; *Thompson* v. *City of Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624, 629, 4 L.Ed.2d 654.

QUESTIONS PRESENTED

I.

Whether the Opinion and Judgment of the Court of Appeals Affirming Petitioner's Conviction Below on a Record Absolutely Devoid of Any Evidence That He Personally Benefited from or Was Lawfully Liable to Pay Federal Income Tax on Any of the Missing Fines Constitutes a Denial of the Due Process of Law Guaranteed Him by the Fifth and Fourteenth Amendments to the Constitution of the United States

Holland v. *United States*, 348 U.S. 121, 136, 138, 75 S.Ct. 129, 135, 137.

Siravo v. *United States*, 1 Cir., 377 F.2d 469, 473.

Thompson v. *City of Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624, 4 L.Ed.2d 654, 80 S.Ct. 629.

Garner v. *State of Louisiana*, 368 U.S. 157, 163, 82 S.Ct. 248, 251, 7 L.Ed.2d 207.

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Curry v. *McCanless*, 307 U.S. 357, 369-370, 59 S.Ct. 900, 907, 83 L.Ed. 1339.

Bowles v. *Willingham*, 321 U.S. 503, 518, 64 S.Ct. 641, 649, 88 L.Ed. 892.

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IV.

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Riggs v. *United States,* 5 Cir., 280 F.2d 949, 955.

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Wood v. *United States*, 8 Cir., 342 F.2d 708, 713, Cert. Den. 361 U.S. 802.

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Federal Trades Commission v. *Flotill Products, Inc.*, 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed.2d 398.

United States v. *Correll*, 389 U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537.

Charles Dowd Box Co. v. *Courtney*, 368 U.S. 502, 514, 82 S.Ct. 519, 526, 7 L.Ed.2d 483.

V.

There Was No Competent, Substantial Evidence upon Which a Jury Might Reasonably Find Beyond a Reasonable Doubt Petitioner at the Time Complained Of Had the Necessary Cognition, Volition and Capacity to Make Him Criminally Responsible

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Direct Sales Co. v. *United States*, 319 U.S. 703, 711, 63 S.Ct. 1265, 1269(4), 87 L.Ed. 1674.

Kotteakos v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557.

STATEMENT OF THE MATTER INVOLVED

The Court of Appeals summarized the indictment as follows (Opinion, Ex. A, Appendix, pages A1-A2):

> "Count I of the indictment charged defendant with knowingly attempting to evade a large portion of his 1961 federal income tax by filing a false return substantially understating his income, in violation of 26 U.S.C.A., Sec. 7201, Count II, charged defendant with wilfully making and subscribing a 1961 income tax return which he did not believe to be true and correct as to all material matters, in violation of 26 U.S.C.A., Sec. 7206 (1)."

The Court of Appeals affirmed the conviction on Count I, but reversed the conviction on Count II as pyramiding penalties for the same transaction.

The facts are briefly as follows:

Defendant, a Missouri lawyer, was elected to, and served as Judge of the Magistrate Court, Eastern Division, Clay County, Missouri, beginning January 1, 1955 and ending December 31, 1962. (A. 365, 366, 44 Par. 25). He subsequently was elected Probate Judge of Clay County and served a full four-year term. (A. 366).

The Magistrate Court had jurisdiction over misdemeanors, preliminary hearings in felony cases and jurisdiction in civil cases involving up to $2,000.00. (A. 366).

During the calendar year 1961 approximately 900 criminal cases were filed in said Court and about 600 of them disposed of by hearings. (A. 45, par. 27, 366, 367).

All payments of fines and costs paid other than by cash had to be approved by defendant. (A. 297, 45 Par. 28).

Up to about September, 1961, the two full-time clerks in the Magistrate Court were Cordelia Spencer and Thelma Lucas. (A. 153, 185). Mrs. Lucas was Clerk on the criminal side. (A. 185, 219). Miss Spencer was assigned to the civil division, but both worked on criminal. (A. 167, 219). These clerks were bonded—defendant was not. (Sec. 483, 485, R.S.Mo., 1959). They both testified for the Government, although themselves prime suspects and interested in protecting themselves (A. 152-194, 218-223). It was stipulated that six of the court employees were authorized to accept money and give receipts. (A. 52, Par. 72). All these had ready access to court funds and defendant here testified to his innocence. (A. 376, 377, 392, 393, 52 Par. 72).

The procedure was when a complaint was filed the clerk would prepare and issue a warrant, make a file folder and fee sheet, put the name and number of the case on it and staple a white piece of paper on the inside of the folder. (A. 154, 155, 156). While holding court the judge had this folder in the court room. (A. 157). The judge arraigned the accused, set bond and fixed the date of hearing and noted such facts on the white paper inside the folder. (A. 156, 157). The clerks copied this information on the fee sheet. (A. 157). If money or checks were given to the judge he customarily put them in the file folder, then handed them to the clerk. (A. 157, 168, 133, 196, 107, 108, 249, 522).

The clerks accepted the money and wrote receipts therefor and made the deposits. (A. 160, 170, 173, 174, 216, 219, 226, 154, 171). The receipts were numbered consecutively. (A. 158, 159, 174). All payments of money in the form of cash bond, costs or fines received in the clerk's office were recorded on the fee sheet. (A. 159).

The clerks did not accept personal checks without approval of the judge either by writing his name on the back of the check or by a nod of his head. (A. 161, 186, 298, 239, 371, 227, 242, 243, 246, 247, 250, 255, 259, 297, 298, 371, 372, 392).

When money or checks were given to defendant he would hand it to the clerks or put it in the file folder for the clerks. (A. 133, 240, 157, 168, 196, 107, 108, 223, 224, 249, 522).

Receipts for money were made out in triplicate, defendant got the white copy, the pink goes to the auditor's office and the yellow copy is retained in the clerk's office. (A. 162, 163).

Defendant had been under cortisone treatment by local doctors for a period of about ten years for a hereditary condition of atopic dermatitis and as a result of this treatment had developed cushnoit features of Cushing's Syndrome "with the round face, thick neck, hump, protuberant abdomen and spindling extremities." (A. 314, 315, 324, 330, 332, 346, 400, 402, 373, 412, 325, 326, 332, 374).

The government points to the special account in the Excelsior Trust Company designated John L. Lodwick, Jr., Special Account, Court House, Liberty, Missouri, as its best evidence petitioner appropriated court money to his own use.

Two young men, Ernest Mautino, Jr., and Robert Mahoney, were defendants in companion cases of burglary and larceny. (A. 123, 459, Ex. 29; 462 Ex. 33). Both were sentenced on reduced charges, fined and put on probation for a year beginning on August 5, 1961, with a promise to remit the fines at the end of the probationary period on condition of good behavior. (A. 459, Ex. 29; 462, Ex. 33).

This special account was opened as a suspense or escrow account for those two fines so as to make them available in the event remittance became due. (A. 461, 519-520, 566, 567, 122-123, 575, 297, 301, 303).

Section 549.193, R.S.Mo., 1959, authorized the Magistrate to place a defendant on probation on condition of good behavior.

Section 549.111, R.S.Mo., 1959, provided that at the end of a successful period of probation the fine or jail sentence was automatically abated so as to call for immediate refund of the fine.

Under Missouri law at the end of each month any balance in the criminal account had to be paid over to the

county treasurer. Sections 50.350, 50.360, 55.240, 57.130, 57.380, R.S.Mo. 1959. (A. 169, 174). It was the custom for the clerks of the magistrate court to collect and report this money instead of the sheriff as named in these statutes. It was therefore necessary, and common and accepted practice to hold fines in probation cases in suspense in special bank accounts during the probationary period. (A. 188, 189, 217, 368, 369).

The probationary period of one year beginning August 5, 1961, would not end until August 5, 1962, but the 1961 tax year ended on December 31, 1961, approximately five months after the beginning date of probation and some seven months before the end of the probationary period and so could not constitute failure to report income due in 1961. These funds were not withdrawn until September 17, 1962, and the Government evidence failed to show who got the money at that time. (A. 291, 292, 294, 568, Ex. 5B). Both defendants complied with their parole and were released on May 21, 1962, and May 28, 1962. (A. 459, Def. Exs. 29 and 33). There was no evidence such fines were not refunded at that time. 1962 records of the magistrate court and county treasurer were not in evidence. Ernest Mautino, Jr., testified as a witness for the Government and was not asked whether his fine was refunded. (A. 119-125). Robert Mahoney was not called as a witness. There is no evidence petitioner received or appropriated to his own use the money from this special account and he testified positively he did not. (A. 376, 377, 392, 393).

In the fall of 1961, his condition was so bad that under doctors' orders he took a 26-day trip to Europe in November and December for a change of climate. (A. 326, 327, 330, 335, 374, 386). The trip helped him temporarily, but in about three weeks his afflictions returned. (A. 327).

In February, 1962, defendant was getting worse and worse as the direct result of taking excessive amounts of cortisone and derivatives of cortisone. (A. 326, 331, 332, 346, 325). Because of these conditions his local doctors recommended that he go to Mayo's Clinc in Rochester, Minnesota, for treatment and gradual weaning away from the use of cortisone. (A. 326, 334, 354, 374). He was hospitalized in Mayo's Clinic from February 25 to April 22, 1962. (A. 334, 45, 335, 354). He was put on Griseofulvin, an Anti-fungo agent to control a fungus infection or Athlete's foot in his feet. (A. 450, 403). He was receiving erythromycin, an antibiotic to control the infection in his left hand and forearm. (A. 404). He was in bed and his legs suspended in the air with wet dressings on his left arm and feet. (A. 356, 402, 403, 355, 409). These dressings consisted of gauze saturated in solutions wrapped around his left hand and forearm and feet which had to be changed every two to three hours. (A. 402). He was receiving a sleeping pill or tablet called Placidyl, an hypnotic sedative, at night. (A. 403, 410, 411).

On the morning of April 13, 1962, defendant was so much worse his medicine was changed to a stronger drug. (A. 404, 410, 411, Exh. 77, 477-483). On the night of April 13th, he was given a Placidyl tablet—an hypnotic sedative stronger than before. (A. 410, 411).

On the morning of April 14 defendant's condition was "like it was most mornings. He was confused, and he didn't seem to be interested in his mail at all." (A. 356). On that morning a large envelope arrived through the mail from defendant's brother David in Excelsior Springs enclosing State and Federal Income Tax forms filled out by David from such information as he could find and without consultation or help from defendant. (A. 374, 375, 316, 317). Defendant's mother who was there on a visit

opened the envelope, obtained a table to put on the bed, got a pen and showed him where to sign. (A. 357). Defendant did not inquire about his return and his mother did not explain. Defendant signed his Federal Income Tax return and made out and signed a check for the amount due. (A. 357). Defendant did not read the tax return or have it read to him. (A. 357). Defendant did not seem interested in what he was signing. (A. 357). His mother then put the income tax returns and checks in the mail. (A. 357).

Later defendant had no recollection of having signed the tax returns. (A. 375, 388).

Defendant signed this tax return on April 14, 1962, on the 48th day of his confinement in the Mayo Clinic. (A. 356, 357, 45, Par. 40).

During all of that time he had been out of touch with his office and unable to take any part in the preparation of his income tax return. (A. 45, 356, 357).

His brother David Lodwick made up his return from such information as he was able to discover without consultation or help from defendant. (A. 316, 374, 375).

Defendant signed the tax return on the last day to mail it with the help of his mother without reading it and wrote a check to pay the amount indicated to be due. (A. 356, 357). It made such a little impression upon him in the condition he was in at the time that he had no memory of it afterward. (A. 375, 377, 391).

The only evidence as to petitioner's condition at the time he signed his income tax return having any tendency to show petitioner was in better condition was that of Dr. Harold O. Perry, a staff supervisory consultant in dermatology who came on this service three days before, found

him worse on the morning of April 13 and ordered stronger drugs, and in the face of silence of the hospital records on that date by pyramiding inference upon inference upon inference presumed petitioner was improved on April 14th. (A. 404, 410, 411, 407, 408).

Dr. Perry's testimony will be discussed more fully under Point IV herein. This indictment came on February 20, 1968, more than six years after the end of the 1961 tax year, and more than five years after he left the Magistrate Court on December 31, 1962. (A. 6, 7, 365, 366, 44, Par. 25).

With full cooperation of petitioner and his counsel even to the point of stipulating many of the facts (A. 20-34, 39-55) and with sixteen solid leads (A. Vol. I, p. 222) and with all the discovery services of the United States Internal Revenue agents available, the Government was unable to prove that petitioner ever cashed a single check for a fine or personally had the use or benefit of a single dollar of fine money which had passed through his hands in his official capacity.

SENTENCE

Petitioner was tentatively sentenced to the maximum punishment of five years on Count One and three years on Count Two pending completion of a study and recommendation to be used by the District Court in fixing his final sentence under the provisions of Section 4208 (b), Title 18, U. S. Code. (A. 61, 62).

On appeal to the Court of Appeals the case was briefed on both sides by counsel other than the trial counsel, who erroneously advised the Court of Appeals that they understood that the sentences were to run consecutively for

the maximum terms. The Court of Appeals reversed Count Two and affirmed Count One as if it were a final judgment for the maximum of five years. (Appendix, Ex. A, pages A7-A8).

The trial court, the United States Attorney and Petitioner moved the Court of Appeals to correct the record, opinion and judgment of that court to show this was only a tentative sentence pending a study (Appendix, Exs. D, E, and F, pp. A20, A22, and A28), but the Court of Appeals summarily overruled and denied all such motions.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

I.

Whether the Opinion and Judgment of the Court of Appeals Affirming Petitioner's Conviction Below on a Record Absolutely Devoid of Any Evidence That He Personally Benefitted From or Was Lawfully Liable To Pay Federal Income Tax on Any of the Missing Fines Constitutes a Denial of the Due Process of Law Guaranteed Him by the Fifth and Fourteenth Amendments to the Constitution of the United States

The Government's evidence showed that certain fines were originally delivered into the hands of Petitioner in his official capacity as Judge of the Magistrate Court. It was stipulated there were six employees of the Magistrate Court authorized to accept money and give receipts during the period involved. (A. 52, Par. 72). The established procedure was for Petitioner to give fines paid to him to one of the clerks for processing, depositing and record keeping. Petitioner furnished the Government all of the records in his possession, made all the leads available to it

and stipulated to most of the facts. (A. Vol. I, p. 222). With all that discovery available the Government was unable to prove Petitioner personally benefitted from a single penny of the missing fine money. Either the Government did not investigate these leads or found nothing wrong. This would not shift the burden of proof to defendant under the case of *Holland* v. *United States,* 348 U.S. 121, 136, 138, 75 S.Ct. 129, 135, 137. Defendant took the stand and denied under oath that he personally received the benefit of any of such missing fine money. (A. 376, 377, 392, 393).

The Government here wholly failed to carry its "ultimate burden to show that the taxpayer received not only gross income but also taxable income." *Siravo* v. *United States,* 1 Cir., 377 F.2d 469, 473. It was the Government's burden to show the missing fines were beneficial income to Petitioner so as to become taxable income. The only interest of the United States was protection of its revenue. This was an essential element of the Government's case as to which there is no evidence in this record.

Admittedly the fines here involved came into Petitioner's official possession originally in a lawful manner. It is the Government's position that after lawful receipt by him, Petitioner thereafter was guilty of conversion. Nothing short of personal use or benefit of this money by Petitioner would make it taxable income to him. Unless plaintiff had the use or benefit of it so as to make it taxable income there would be no income tax liability on him, either civil or criminal.

In the case of *Thompson* v. *City of Louisville,* 362 U.S. 199, 206, 80 S.Ct. 624, 4 L.Ed.2d 654, 80 S.Ct., the Court said (l.c. 629):

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction

upon a charge not made would be sheer denial of due process,"[12] so is it a violation of due process to convict and punish a man without evidence of his guilt.[13]"

See to like effect: *Garner* v. *State of Louisiana,* 368 U.S. 157, 163, 82 S.Ct. 248, 251, 7 L.Ed.2d 207.

The Fifth and Fourteenth Amendments to the Constitution of the United States are designed to require both the State and National Governments to give the same protection and immunity to citizens.

Heiner v. *Donnan,* 285 U.S. 312, 326, 52 S.Ct. 358, 361, 76 L.Ed. 772; *Curry* v. *McCanless,* 307 U.S. 357, 369-370, 59 S.Ct. 900, 907, 83 L.Ed. 1339; *Bowles* v. *Willingham,* 321 U.S. 503, 518, 64 S.Ct. 641, 649, 88 L.Ed. 892.

Without any evidence in this record that Petitioner had the use or benefit of the missing funds there is necessarily a reasonable doubt and hence no submissible case against him.

In the case of *Hiet* v. *United States,* 365 F.2d 504, the Court of Appeals for the District of Columbia said (l.c. 506):

"Without any evidence whatever connecting Hiet with the missing property, I think there is necessarily a doubt (more than a reasonable one, I think) that he took it and carried it away. The doubt is not a visceral or moral one; it is a doubt upon the record; the lack of essential proof creates the doubt as a legal matter. So the judgment must be reversed."

In the case of *Austin* v. *United States,* App. D.C., 382 F.2d 129, the Court said (l.c. 138):

"A motion for acquittal must be granted when the evidence, viewed in the light most favorable to the Government, is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime.[19]"

See cases cited in footnote 19 at the bottom of page 138 of 382 F.2d, supra.

II.

Whether in Submitting the Case to the Jury Solely on Evidence That Defendant As Judge of a Court with Eight Employees Handling the Court Money Received in His Official Capacity Certain Fines Not Forwarded the County Treasurer As Required by State Law or Any of It Traced to Defendant's Personal Use or Benefit the Court Did Not Erroneously Shift the Burden of Evidence to the Defendant and Force Him to Become a Witness Against Himself in Violation of Rights Guaranteed Him under the Fifth Amendment to the Constitution of the United States

Under Missouri State law proof of the charges in this indictment in a State Court would be sufficient to convict defendant of a felony and expose him to a possible maximum sentence of imprisonment in the penitentiary for a period of ten years. (Sections 560.156(2) and 560.161, R.S.Mo., 1959).

Such a conviction in the State Court would expose defendant to double the maximum punishment permitted under either charge of this indictment.

Upon being asked by the Court of Appeals during oral argument whether there were prosecutions presently pending in the State Courts involving these same matters the United States Attorney informed the Court that such proceedings were pending and untried in the State Courts. The trial court noted that fact at the time of preliminary sentencing. (Appendix, Ex. E, p. A23).

This case was submitted to the jury upon the Government's theory that receipt of the fine money by defendant

in his official capacity was alone sufficient evidence that he converted and appropriated it to his own use so as to cause it to become taxable income to him unless he explained his disposition of the funds to the satisfaction of the jury.

This erroneous ruling compelled defendant to take the stand in his own behalf and try to refresh his recollection and explain as best he could numerous transactions occurring during a period he was ill and after the six and approximately one-half years that lapsed so that his memory had grown dim and some of the records were no longer available.

In the Government's brief in the Court of Appeals on pages 35 and 36, an attempt is made to take advantage of this situation in reverse. It is there argued that the jury could find that defendant's motive for not reporting such fines was fear of exposing his alleged earlier embezzlement of public funds and exposing him to State prosecution, and urged the value of that situation as proof of willfulness and criminal intent.

We submit that constitutes recognition by the Government that taking the stand in his own behalf in this case necessarily exposed him to "real and appreciable" risk of self-incrimination.

Had not the trial court erroneously ruled that mere receipt of fine money by defendant in his official capacity was sufficient evidence that he embezzled the money and appropriated it to his own use so as to make it taxable income to him thereby putting the burden on him to explain its disposition to the satisfaction of the jury there would have been no necessity for defendant to take the stand in this case.

Such erroneous ruling denied defendant due process of law and forced him to become a witness in his own defense in violation of his rights guaranteed under the Fifth Amendment to the Constitution of the United States.

The Government's cross-examination of defendant was directed to convincing the jury defendant was evasive rather than having a faulty recollection. (A. 378-391, 393-394). This put defendant to great disadvantage before the jury when because of severe illness and absences during parts of the period in question plus the lapse of six and one-half years defendant could not give definite answers to sixteen particular transactions occurring during a busy year during which he handled 900 criminal cases. (A. 366).

This case was given great publicity due to the prominence of defendant and his official position. The long delay in bringing the State cases to trial indicates the State is awaiting the final outcome of this case.

The State could not have compelled defendant to testify but it is impossible to prevent the State from obtaining a copy of defendant's testimony from the public records of this case for use against him in the State Court trial, unless this case is reversed and such testimony stricken as illegally obtained in violation of defendant's Constitutional rights.

We submit that application of the law as declared by this Court in the recent case of *Leary* v. *United States*, 89 S.Ct. 1532, calls for reversal of this case, on both grounds of violation of defendant's rights against self-incrimination and erroneously shifting the burden of evidence to him by reason of the Government's reliance upon proof of receipt of fine money by defendant as being sufficient evidence that he converted it to his own use and benefit unless he took the stand and succeeded in explaining its disposition to the satisfaction of the jury.

Here as in the *Leary* case the Court erroneously shifted the burden of evidence to the defendant compelling him to take the stand in his own behalf in violation of his rights under the Fifth Amendment. Here as there at the time of the trial in this case defendant was confronted with a real and substantial risk of self-incrimination in the State Court if he took the stand and testified in his own behalf. Here as there he did take the stand and testify in his own behalf. We submit under the ruling in the Leary case the Fifth Amendment constitutes a complete defense to both Counts of the Indictment and for such reason the remaining Count One should be reversed for such reason alone.

Throughout the trial it was the Government's contention that the defendant had failed to report as income money he had converted, stolen and embezzled while Magistrate Judge of Clay County, Missouri. If the defendant would have reported said income on his federal income tax returns, he obviously would have incriminated himself and subjected himself to a state prosecution for such embezzlement and theft. If he reported such income on his federal return but not on his state income return he would have subjected himself to prosecution. In both instances his guilt would have been established by his reporting (i.e.: registration) to the federal government under the Internal Revenue Code. What has just been said must not be taken in any way as an admission of guilt.

Those provisions of the Internal Revenue Code, and the decisions interpreting the same, requiring the reporting of money acquired illegally as being "income", are just as much an unconstitutional registration and denial of defendant's privilege against self-incrimination, as guaranteed by the *Fifth Amendment*, as was the marijuana tax law. (See *Leary* v. *United States*, supra, the gambling tax law

(*Marchetti* v. *United States*, 390 U.S. 39, 88 S.Ct. 697; *Grosso* v. *United States*, 390 U.S. 62, 88 S.Ct. 709), and the firearms registration law (*Haynes* v. *United States*, 390 U.S. 85, 88 S.Ct. 722))

III.

Whether the Court of Appeals Misunderstood, Misconstrued and Misapplied the Opinion of This Court in the Case of Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 97 L.Ed. 150 and Thereby Applied the Wrong Legal Test to the Sufficiency of the Evidence to Sustain the Convictions Herein in Violation of Petitioner's Rights under the Fifth and Fourteenth Amendments to the Constitution of the United States

The *Holland* case was strictly a net worth case and involved an instruction case. This is not a net worth case and does not involve an instruction issue. (Opinion, Ex. A, Appendix, p. A3).

The basic holding in the *Holland* case was (348 U.S., l.c. 139-140, 75 S.Ct., l.c. 137):

> "The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, Garst v. United States, 4 Cir., 180 F. 339, 343; Anderson v. United States, 5 Cir., 30 F.2d 485-487; Stutz v. United States, 5 Cir., 47 F.2d 1029, 1030; Hanson v. United States, 6 Cir., 208 F.2d 914, 916, but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect, United States v.

Austin-Bagley Corp., 2 Cir., 31 F.2d 229, 234, certiorari denied, 279 U.S. 863, 49 S.Ct. 479, 73 L.Ed. 1002; United States v. Becker, 2 Cir., 62 F.2d 1007, 1010; 1 Wigmore, Evidence (3d ed.), §§ 25-26."

In the case of *Cuthbert* v. *United States*, 5 Cir., 278 F.2d 220, the Court said (l.c. 224):

"In Panci v. United States, 5 Cir., 256 F.2d 308, at page 312, stating that upon the evidence in the case the result would be to convict on suspicion, the court, citing Kassin v. United States, 5 Cir., 87 F.2d 183, said:

'In that case and other circumstantial evidence cases, this court has without wavering declared that the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt and equally without varying has applied it.'"

* * *

"Nothing said in Holland v. United States, 348 U.S. 121, at page 140, 75 S.Ct. 127, 137, 99 L.Ed. 150, or in the authorities there cited, is at all inconsistent with what has just been said by us. What and all that was in question in Holland's case was whether the court had erred in refusing to instruct 'that where the government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt.'"

After referring to cases holding contra, the court there said (278 F.2d, l.c. 224):

"We cannot and do not agree, however, that in arriving at a decision that, as matter of law, evidence is sufficient to take the case to the jury, it is not necessary that the evidence can reasonably be found

to be consistent with the conclusion of guilt and wholly inconsistent with every other reasonable conclusion. On the contrary, we are of the clear opinion that in a case where the evidence relied on to establish guilt is entirely circumstantial, it is essential to a just decision by the district judge that the evidence makes out a fact case for the decision of the jury, that the court conclude, that the jury might reasonably find not only that the evidence is consistent with a finding of guilt but that it is not consistent with any other reasonable conclusion. If this is not so, a verdict of guilt beyond a reasonable doubt, based wholly on circumstantial evidence, though it keeps the promise of a fair trial to the ear, breaks it to the hope."

In discussing the duty of the Government to investigate leads in a net worth case, the court, in the *Holland* case said (348 U.S., l.c. 138, 75 S.Ct., l.c. 137):

"This is not to say that the Government may disregard explanations of the defendant reasonably susceptible of being checked. But where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant."

Here relevant sixteen direct leads were forthcoming, in fact were largely stipulated. (A Vol. I, p. 222). They were reasonably susceptible of being checked, and it may be reasonably assumed that they either were not checked or checked and found unfavorable to the Government's case.

In the *Holland* case the Court said (348 U.S., l.c. 136, 75 S.Ct., l.c. 135):

"When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

Here so far as revealed by its evidence and the Government's investigation stopped at the threshold upon receipt by petitioner in his official character, and did not carry into the realm of who really got the beneficial use of such funds.

Other cases holding the *Holland* ruling applies only to instructions to the jury are: *Battles* v. *United States*, 5 Cir., 388 F.2d 799, 802(3), and cases cited in footnote 3 to said case; *Thurmond* v. *United States*, 5 Cir., 377 F.2d 448; *Thomas* v. *United States*, 9 Cir., 369 F.2d 372, 373.

The opinion and judgment in this case is in direct and irreconcilable conflict with such cases, and we submit misconstrues and misapplies the *Holland* case.

Other cases construing the *Holland* case as not changing the law as to tests for determining the submissibility of a case are set out under Point IV of this petition.

As an alleged conflict between the determination made by the Court of Appeals and an earlier decision of this Court in the *Holland* case, supra, this is a valid ground for certiorari. *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367; *Heflin* v. *United States*, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed. 407.

Because of the general confusion in the district courts and the Courts of Appeals as to the exact meaning of the *Holland* case, we submit certiorari should be granted here-

in to resolve such conflict and clarify the law. *United States* v. *Behrens*, 375 U.S. 162, 84 S.Ct. 295, 11 L.Ed.2d 224.

IV.

Whether the Opinion and Judgment of the Court of Appeals Herein Is Not in Direct and Irreconcilable Conflict with the Following Opinions and Judgments of Other Courts of Appeals Holding That the Holland Decision Has Not Changed the Law That "Where the Government's Evidence Is Circumstantial It Must Be Such As to Exclude Every Reasonable Hypothesis Other Than That of Guilt" Does Not Call for Certiorari to Review This Important and Recurring Question of Criminal Law

This is a circumstantial evidence case and so considered and ruled by the Court of Appeals. (Opinion, Ex. A, pp. A1-A8 Appendix).

In ruling "the sufficiency of the evidence to support the conviction on each count" the Court of Appeals herein specifically refuses to apply the above test under the mistaken and erroneous belief that such test is no longer valid under the *Holland* decision (348 U.S. 121, 75 S.Ct. 127). (Opinion, Ex. A, p. A3).

In the case of *Riggs* v. *United States*, 5 Cir., 280 F.2d 949, the Court said (l.c. 955):

> "The position of the Fifth Circuit becomes even clearer when we consider that, as a practical aid to its review of the sufficiency of the evidence to justify a finding of guilt beyond a reasonable doubt in circumstantial evidence cases, '* * * this court has without wavering declared that the test to be applied is

whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt, and equally without wavering has applied it.' Panci v. United States, 1958, 256 F.2d 308, 312."

The Government insists that the legal principle announced in the cases just cited has been rejected by the Supreme Court in the case of Holland v. United States, 1954, 348 U.S. 121, 139-140, 75 S.Ct. 127, 99 L.Ed. 150. However, this Court has ruled to the contrary in a case decided since the present case was argued and submitted. Cuthbert and Busby v. United States, 5 Cir., 1960, 278 F.2d 220. It was there pointed out that nothing said in the Holland case, or in the authorities cited in that case, is at all inconsistent with the test to be applied in circumstantial evidence cases on motion for judgment of acquittal and on review of the denial of such motion as to whether the inferences reasonably to be drawn from the evidence were not only consistent with guilt of the accused but inconsistent with every reasonable hypothesis of his innocence.

It seems to us that the Supreme Court itself is not in accord with the 'Second Circuit doctrine' but is in accord with that prevailing in this Circuit and in other circuits."

In support of the last statement just quoted the Court there cited the cases of *Mortensen* v. *United States,* 322 U.S. 369, 374, 64 S.Ct. 1037, 1040, 88 L.Ed. 1331 and *American Tobacco Company* v. *United States,* 328 U.S. 781, note 4, 66 S.Ct. 1125, 1128, 90 L.Ed. 1575.

In the *Riggs* case, supra, 280 F.2d 949, the Court after referring to the erroneous theory adopted in the opinion herein, said (l.c. 954):

"The question was further discussed at length by that Circuit in still later opinions, in United States v. Costello, 2 Cir., 1955, 221 F.2d 668, 671, in United States v. Gonzales Castro, 2 Cir., 1956, 228 F.2d 807, and in United States v. Masiello, 2 Cir., 1956, 235 F.2d 279. In powerful dissents in the last two cases, Judge Frank termed this ruling the 'Second Circuit doctrine' (235 F.2d 288) to distinguish it from cases which he cited to show that a contrary doctrine prevailed in the Third, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits. See footnote 4, 228 F.2d 809, and footnote 12, 235 F.2d 291. See also footnote 3, 221 F.2d 680."

The Opinion of the Court of Appeals Is in Conflict with the Following Courts of Appeals Decisions

FIFTH CIRCUIT DECISIONS

Some of the decisions of the Fifth Circuit holding in accord with the *Riggs* case, supra, and contrary to the opinion of the Eighth Circuit herein are: *Montoya* v. *United States,* 5 Cir., 402 F.2d 847, 850(5); *McMillian* v. *United States,* 5 Cir., 399 F.2d 478, 479(6); *Cohen* v. *United States,* 5 Cir., 363 F.2d 321, 327(5), Cert. Den. 385 U.S. 957; *Battles* v. *United States,* 5 Cir., 388 F.2d 799, 802(3).

NINTH CIRCUIT DECISIONS

Miller v. *United States,* 9 Cir., 382 F.2d 583, 585(2), Cert. Den. 309 U.S. 984, Reh. Den. 391 U.S. 971; *Thomas* v. *United States,* 9 Cir., 369 F.2d 372, 373(2); *Whaley* v. *United States,* 9 Cir., 362 F.2d 938, 939(2); *Figueroa* v. *United States,* 9 Cir., 352 F.2d 587, 589(2); *Matthews* v. *United States,* 9 Cir., 394 F.2d 104, 105(3).

THIRD CIRCUIT DECISION

Government of the Virgin Islands v. *Lake*, 3 Cir., 362 F.2d 770, 774(2).

EIGHTH CIRCUIT DECISIONS

Sykes v. *United States*, 8 Cir., 312 F.2d 232, 235(6), Cert. Den. 373 U.S. 942; *Wood* v. *United States*, 8 Cir., 342 F.2d 708, 713, Cert. Den. 361 U.S. 802; *Conaway* v. *United States*, 8 Cir., 349 F.2d 907, 911, Cert. Den. 382 U.S. 976; *Byrth* v. *United States*, 8 Cir., 327 F.2d 917, 919(1), Cert. Den. 377 U.S. 931; *Lerma* v. *United States*, 8 Cir., 387 F.2d 187, 188, Cert. Den. 391 U.S. 907; *Tri-Angle Club, Inc.*, v. *United States*, 8 Cir., 265 F.2d 829, 833(6).

The Court of Appeals cites four decisions of the Eighth Circuit contra to the above (Opinion, Ex. A, Appendix p. A3), which with the present case makes five against and six Eighth Circuit cases supporting our position in this matter.

Conflict of the opinion in this case with the opinions of other Courts of Appeals is a valid ground for Certiorari. *Federal Trades Commission* v. *Flotill Products, Inc.*, 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed.2d 398.

We have here a recurring question of criminal law of great importance in the administration of the criminal and tax laws of the United States. *United States* v. *Correll*, 389 U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537.

In the case of *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 514, 82 S.Ct. 519, 526, 7 L.Ed.2d 483, the Court in resolving conflicts among the circuits said:

> "To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court."

V.

Whether There Was Any Competent, Substantial Evidence upon Which a Jury Might Reasonably Find Beyond a Reasonable Doubt Petitioner at the Time Complained of Had the Necessary Cognition, Volition and Capacity to Make Him Criminally Responsible

In our statement we have briefly outlined the testimony as to Petitioner's physical and mental condition at the time he signed the income tax return without reading it.

The only evidence having any tendency to the contrary was that of Dr. Harold O. Perry, a dermatology staff doctor of the famous Mayo Clinic of Rochester, Minnesota.

This doctor when first approached had no independent recollection of Petitioner but after reviewing such records as were available he attempted to reconstruct in his mind plaintiff's condition six years before on the morning in question, which was only the third day of Dr. Perry's supervisory service in this ward. (A. 363, 365, 395, 396).

He made one round through the ward in the morning (A. 400) spending only 2 to 4 minutes with each patient. (A. 411).

On the day before which was the 13th of April 1962 he found Petitioner was worse and changed his medication

and increased his narcotic sedatives. (A. 404, Ex. 77, 477-483). He was a sick man and needed continuous nursing. (A. 411, 412).

He had a physical problem, a medical condition and this dermatologist specialist was so concerned with that that nothing else "seemed to be amiss at the time." (A. 404).

As to the morning in question the hospital records were silent as to Dr. Perry seeing Petitioner on his rounds. Dr. Perry checked the hospital records and found he was not marked absent on that day and so assumed he was on duty at that time; he assumed that if he was on duty he called on Petitioner in making his rounds; since the hospital record was silent he assumed Petitioner was improved or he would have noted it in the hospital records. (A. 406, 407). From that he gave it as his opinion that there was nothing in Petitioner's condition that would have affected his knowledge that he was signing a tax return. (A. 14). Assuming this was competent evidence (which we deny) it was yet insufficient to make a submissible case for under the law:

> "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal." *United States* v. *Crimmins*, 7 Cir., 123 F.2d 271, 272.

Mere knowledge he was signing a tax return made out by another without reading it was no proof that he knew he was signing a tax return known by him to be false and incorrect with willful intent.

But aside from that this constitutes an impermissible pyramiding of inferences upon inferences.

In the case of *Gallegos* v. *United States*, 10 Cir., 237 F.2d 694, the Court said (l.c. 698):

> "As defendants correctly contend, convictions cannot be based upon a pyramiding of inferences or presumption on presumption. Rosemberg v. United States, 10 Cir., 120 F.2d 935."

Here because he was not marked absent in the hospital records he inferred or presumed he was present on the day in question; having presumed he was present he inferred or presumed he called upon Petitioner on that date; having presumed he called on Petitioner that day he presumed or inferred Petitioner was improved as there was no notation in the hospital records as to Petitioner's condition on that morning.

The doctor's testimony rests upon a progression of inferences or presumptions. His testimony rests upon inferences or presumptions supported only by inferences or presumptions and never touches base to find support on a solid fact.

Such evidence was incompetent, without probative force and wholly insufficient to justify a jury finding beyond a reasonable doubt that Petitioner possessed the necessary cognition, volution and capacity to make him criminally responsible under any version of the rule against piling inference upon inference. See *United States* v. *Hopps*, 4 Cir., 331 F.2d 332, 336, Cert. Den. 379 U.S. 820;

Direct Sales Co. v. *United States,* 319 U.S. 703, 711, 63 S.Ct. 1265, 1269(4), 87 L.Ed. 1674.

Dr. Perry with the aura of prestige as a staff member of the world renowned Mayo's Clinic of Rochester, Minnesota, made a tremendous impression upon this lay jury as if his was a voice from Olympus.

In the case of *Kotteakos* v. *United States,* 328 U.S. 750, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557, the Court said:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

CONCLUSION

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit to the end that this cause be reversed as to Count One of the Indictment, Count Two having already been reversed.

WALTER A. RAYMOND AND
KENNETH C. WEST
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

The undersigned, Walter A. Raymond, counsel of record for Petitioner, hereby certifies that the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit is submitted in good faith and is believed to be meritorious.

WALTER A. RAYMOND

EXHIBIT A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,442

United States of America,
Appellee,

vs.

John L. Lodwick, Jr.,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.
[May 22, 1969.]

Before VAN OOSTERHOUT, Chief Judge; MATTHES and HEANEY, Circuit Judges.

VAN OOSTERHOUT, Chief Judge.

This is a timely appeal by defendant John L. Lodwick, Jr., from judgment and sentences imposed on June 21, 1968, after conviction by a jury, on each count of a two-count indictment and from the order entered August 26, 1968, denying defendant's post-trial motion for judgment in accordance with motion for acquittal or a new trial.

Count I of the indictment charged defendant with knowingly attempting to evade a large portion of his 1961

federal income tax by filing a false income tax return substantially understating his income, in violation of 26 U.S.C.A. § 7201. Count II charged defendant with willfully making and subscribing a 1961 income tax return which he did not believe to be true and correct as to all material matters, in violation of 26 U.S.C.A. § 7206(1). The court sentenced defendant to five years upon Count I and three years upon Count II under the provisions of 18 U.S.C.A. § 4208(b). The parties agree the sentences are to be served consecutively.

Defendant relies upon the following points for reversal:

1. The court erred in overruling his motions for acquittal which were reasserted in post-conviction motions as to each count for the reason that the Government failed to prove beyond a reasonable doubt:

(a) That defendant received any substantial items of income during 1961 which were not included in his 1961 tax return.

(b) That defendant in light of his physical and mental condition at the time he signed his 1961 return had cognition, volition and capacity to make him criminally responsible for his acts.

(c) That every element of the offenses alleged in each count was established.

2. The court erred in failing to sustain defendant's motion to require the Government to elect between Counts I and II of the indictment, thereby subjecting the defendant to double jeopardy and double punishment for one alleged offense, in violation of his Fifth Amendment rights.

Defendant in his first point challenges the sufficiency of the evidence to support the conviction on each count. Defendant in brief repeatedly asserts that his conviction

is based on circumstantial evidence and hence the proven circumstances must be such as to exclude every reasonable hypothesis but that of guilt and that the proof in this case does not meet such standard. As stated by the defendant, we have on occasion applied such rule in our prior cases. However, the standard advocated by the defendant is rejected by the Supreme Court in *Holland* v. *United States*, 348 U.S. 121, 139, 140, as being "confusing and incorrect." The Court holds:

> "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more."

We have recognized in our post-*Holland* decisions that the exclusion of every reasonable hypothesis other than that of guilt test is no longer valid. *Burke* v. *United States*, 8 Cir., 388 F.2d 286, 287, n. 1; *McClard* v. *United States*, 8 Cir., 386 F.2d 495, 508-09; *Gregory* v. *United States*, 8 Cir., 365 F.2d 203, 205; *Wood* v. *United States*, 8 Cir., 361 F.2d 802, 806.

The burden of course is upon the Government to establish each of the essential elements of its case beyond a reasonable doubt. As pointed out in *Holland*, such right of the defendant is appropriately protected by proper instructions on reasonable doubt. No error is here urged in the court's instructions on reasonable doubt and our examination of the instructions satisfies us that the jury was properly charged on such issue.

In considering the sufficiency of the evidence to support a verdict in a criminal case, the evidence must be considered in the light most favorable to the prevailing party. *Kayser* v. *United States,* 8 Cir., 394 F.2d 601, 604; *Burke* v. *United States,* 8 Cir., 388 F.2d 286, 288; *McClard* v. *United States,* 8 Cir., 386 F.2d 495, 497; *Canaday* v. *United States,* 8 Cir., 354 F.2d 849, 851.

The Government as the prevailing party is entitled to the benefit of all reasonable inferences to be drawn from the evidence. *Kayser* v. *United States,* supra; *Cross* v. *United States,* 8 Cir., 392 F.2d 360; *Cave* v. *United States,* 8 Cir., 390 F.2d 58, 69.

In our present case, substantial evidence in support of all elements of the crimes charged is present. Such evidence if believed by the jury is adequate to support the guilty verdicts. Defendant has offered testimony which, if credited, would preclude his conviction. It is the function of the jury to pass upon the credibility of the witnesses and its determination when supported by substantial evidence should not be upset by a reviewing court. *Gregory* v. *United States,* supra.

We have carefully examined the record. We shall not attempt to set out the voluminous evidence in detail. It is the Government's position that the defendant in his 1961 income tax return willfully understated his income by some $6,625, all of which except for a $350 item arose out of fines defendant assessed in his capacity as a judge of the Magistrate Court, and which he received in 1961 and converted to his own use. The proof that the fines were levied and paid to defendant in currency or by check which he endorsed is clear and it is likewise established that said funds never reached the County Treasury. Most of the fines in controversy were collected on Saturdays

when no regular clerk was on duty. A number of the fine payments are covered by a receipt issued by the defendant. Defendant's testimony is that he has no distinct recollection of the particular transactions. He asserts that all fines he collected were turned over to the clerk and that he has never misappropriated the proceeds of any fine. The regular clerks testified that they have never cashed any checks given in payment of fines but have deposited all checks coming into their hands in the appropriate account with endorsement by a "for deposit only" stamp, and that they likewise have accounted for all cash reaching their hands. Defendant opened a special account at the Excelsior Trust Company on October 10, 1961. Some of the fine money in controversy was traced to this account. The account was closed by a check payable to cash on September 17, 1962. Defendant testified that he did not know what became of the money. The clerks testified they were unaware of this account and that they made no withdrawals therefrom. Defendant testified the account was set up for refund of cash bonds or fines or both. When asked whether the Mahoney and Mautino fines, the proceeds of which had been placed in this account, were refunded he answered, "Not to my knowledge." There is no evidence to show that the proceeds of any cash bonds were deposited in this account or that any refund of cash bonds was made out of this account.

Defendant's 1961 return was filed while he was being treated at the Mayo Clinic for a skin disease and for the adverse effects of the drugs used in the treatment of the disease. Defendant offered testimony that he had no recollection of signing the return or of its contents and that by reason of his mental and physical condition at the time he signed he lacked capacity to have the criminal intent necessary to support the conviction. The issue of defend-

ant's condition and his capacity to possess a criminal intent was submitted to the jury under instructions to which no exception was made, and such issue was obviously resolved by the jury against the defendant The attending physician as a witness expressed the view that there was nothing about defendant's condition on the day of the signing of the return which would have affected his ability to sign the tax return or to have knowledge of its contents. We hold that a substantial evidentiary basis exists to support the jury verdicts.

The court did not commit error in denying defendant's motion to require the Government to elect between Counts I and II of the indictment. The offenses charged in the two counts are not identical. Section 7201 involved in Count I appeared as § 145(b) in I.R.C. 1939. Section 7206(1) appeared as § 145(c) in I.R.C. 1939. In *Gaunt* v. *United States*, 1 Cir., 184 F.2d 284, 288, the Court accurately sets out the difference between the § 145(b) and (c) charges as follows:

> "It seems clear to us that [§ 145(c)] makes it a felony merely to make and subscribe a tax return without believing it to be true and correct as to every material matter, whether or not the purpose in so doing was to evade or defeat the payment of taxes. That is to say, it seems to us that the subsection's purpose is to impose the penalties for perjury upon those who wilfully falsify their returns regardless of the tax consequences of the falsehood. Whereas subsection 145(b) condemns as felonious wilful attempts to evade or defeat taxes 'in any manner', and one manner, certainly, is by the wilful filing of a return known to be false in some material respect. Thus while the proof of an offense under subsection 145(b) may incidentally also prove an offense under § 145(c), it must in addition indicate an intent in some manner to evade or defeat a tax which is due. In brief, it seems to us evident

> that the scope of the two subsections is different with respect to an attempt to evade or defeat taxes, and certainly the language of § 145(b) is broad enough to include the filing of a false and fraudulent return as a punishable manner of attempted tax evasion."

The court held that both charges were properly submitted to the jury and that the § 145(c) charge is a crime which is an included offense of the crime charged in § 145(b). The element essential for the § 145(b) charge (§ 7201) not required in the § 145(c) charge (§ 7206(1)) is intent to evade or defeat the tax.

In *Hartman* v. *United States*, 8 Cir., 245 F.2d 349, 351-52, we quoted extensively from and followed *Gaunt*. The court in *Gaunt* further held that while both charges could be submitted to the jury, only one sentence could be imposed. Support for such view may be found by analogy in *Prince* v. *United States*, 352 U.S. 322, arising out of multiple offenses set out in the Federal Bank Robbery Act. In that case, the right to impose penalties for multiple charges arising out of the same transaction was rejected. To like effect, see *Hardy* v. *United States*, 8 Cir., 292 F.2d 192.

As heretofore pointed out, the statutes on which the charges now before us are based originally appeared as § 145(b) and (c) of I.R.C. 1939. Varying penalties are fixed for the acts proscribed by § 145. Here, as in *Prince*, we do not believe it can fairly be said that Congress intended to pyramid penalties and authorize a separate penalty for an included lesser offense which arose out of the same transaction and which would be established by proof of guilt of the greater offense.

The conviction and sentence on Count I is affirmed. The court erred in sentencing defendant on Count II. This

case is remanded to the District Court with direction to vacate the sentence imposed upon Count II.

Affirmed on Count I; reversed and remanded on Count II.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

EXHIBIT B

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19442

UNITED STATES OF AMERICA,
Appellee,

vs.

JOHN L. LODWICK, JR.,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

APPELLANT'S PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Comes now John L. Lodwick, Jr., appellant in the above-entitled cause and presents his petition for rehearing of the above-entitled cause and in support thereof respectfully shows

I

Appellant respectfully adopts the letter to this Court dated May 23, 1969, of the District Trial Judge, Honorable

John W. Oliver, and the corrected record forwarded therewith as prepared by the official Court Reporter of said Court and incorporates them at this point in the record by reference and prays that the opinion herein be modified and corrected to truly state the correct order as actually directed by the Court and afford appellant the benefit of Section 4208(b), 18 U. S. C. A.

II

The Court in its opinion herein has misunderstood, misconstrued and misapplied the opinion of the Supreme Court of the United States in the case of *Holland* v. *United States*, 348 U.S. 121, 75 S.Ct. 127, and applied the wrong legal test to the sufficiency of the evidence in violation of defendant's rights under the Fourteenth Amendment to the U.S. Constitution.

That was a net worth case and involved an instruction only. Here as the opinion states (Opinion pp. 3-4) there is no complaint as to the instruction on reasonable doubt.

The Supreme Court did not there purport to overrule the previous decisions holding that in circumstantial evidence cases to make a submissible case the evidence "must be such as to exclude every reasonable hypothesis other than that of guilt."

In the case of *Cuthbert* v. *United States*, 5 Cir., 278 F.2d 220, the Court said (l.c. 224):

> "Nothing said in Holland v. United States, 348 U.S. 121, at page 140, 75 S.Ct. 127, 137, 99 L.Ed. 150, or in the authorities there cited, is at all inconsistent with what has just been said by us. What and all that was in question in Holland's case was whether the court had erred in refusing to instruct 'that where the government's evidence is circumstantial it must be such

as to exclude every reasonable hypothesis other than that of guilt.

* * *

"We cannot and do not agree, however, that in arriving at a decision that, as matter of law, evidence is sufficient to take the case to the jury, it is not necessary that the evidence can reasonably be found to be consistent with the conclusion of guilt and wholly inconsistent with every other reasonable conclusion. On the contrary, we are of the clear opinion that in a case where the evidence relied on to establish guilt is entirely circumstantial, it is essential to a just decision by the district judge that the evidence makes out a fact case for the decision of the jury, that the court conclude, that the jury might reasonably find not only that the evidence is consistent with a finding of guilt but that it is not consistent with any other reasonable conclusion. If this is not so, a verdict of guilty beyond a reasonable doubt, based wholly on circumstantial evidence, though it keeps the promise of a fair trial to the ear, breaks it to the hope."

See to like effect *Battles* v. *United States,* 5 Cir., 388 F.2d 799, 802(3) and footnote 3 citing cases from other circuits to like effect.

In the case of *Riggs* v. *United States,* 5 Cir., 280 F.2d 949, the Court said (l.c. 955):

"The position of the Fifth Circuit becomes even clearer when we consider that, as a practical aid to its review of the sufficiency of the evidence to justify a finding of guilt beyond a reasonable doubt in circumstantial evidence cases, '* * * this court has without wavering declared that the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt, and equally without wavering has applied it.' Panci v. United States, 1958, 256 F.2d 308, 312.

The Government insists that the legal principle announced in the cases just cited has been rejected by the Supreme Court in the case of Holland v. United States, 1954, 348 U.S. 121, 139-140, 75 S.Ct. 127, 99 L.Ed. 150. However, this Court has ruled to the contrary in a case decided since the present case was argued and submitted. Cuthbert and Busby v. United States, 5 Cir., 1960, 278 F.2d 220."

III

The Court in its opinion herein stating "substantial evidence in support of all elements of the crimes charged is present" (Opinion p. 4), has completely overlooked or misapprehended the controlling legal fact that there was no evidence whatever that defendant ever appropriated unto his own use or personally had the use or benefit of any of the missing funds, although this issue was briefed in appellant's main brief, Point II, pp. 14-22, inclusive and p. 3 of his reply brief. The evidence wholly failed to prove that defendant got the use or benefit of the missing funds as opposed to one or more of the six employees of the Magistrate Court stipulated to have been authorized to accept money and give receipts during this period (A. 52, Par. 72).

In a similar situation in the case of *Hiet* v. *United States*, 365 F.2d 504, the Court of Appeals for the District of Columbia said (l.c. 506):

"[2] Where only circumstantial evidence is involved, it used to be stated that to sustain conviction the proof must negative every hypothesis save that of guilt. But in the *Holland* case in 1954, the Supreme Court said the better rule is simply to instruct properly on reasonable doubt, and expressed the view that the additional instruction is confusing and incorrect. In the case at bar there was on the evidence in the record a reasonable doubt that Hiet took the property;

> indeed there was no evidence whatsoever that he took it or carried it away. Without any evidence whatever connecting Hiet with the missing property, I think there is necessarily a doubt (more than a reasonable one, I think) that he took it and carried it away. The doubt is not a visceral or moral one; it is a doubt upon the record; the lack of essential proof creates the doubt as a legal matter. So the judgment must be reversed."

The doubt here is a doubt more than a reasonable one on the record—the lack of essential proof that defendant had the use or benefit of the missing money. See to like effect: *Austin* v. *United States*, App. D. C., 382 F.2d 129, 138, and cases cited in footnote 19; *Farrar* v. *United States*, App. D. C., 275 F.2d 868, 870.

There is no evidence that defendant ever cashed a single check here involved, used any court money for his own personal use, put any court money or court checks into his personal checking account or that there was any unexplained increase in his net worth during that period. Not one cent was traced into defendant's personal pocket or personal use. On p. 222, A., Vol. I, is listed the sixteen (16) items claimed to have been collected by defendant and not accounted for in the Magistrate Court accounting. Those constituted sixteen (16) direct leads. The Government either did not follow such leads or did investigate them and found only dry runs. In either case the prosecution failed to make a submissible case of embezzlement.

In the case of *Holland* v. *United States*, 348 U.S. 121, 136, 75 S.Ct. 127, the Court said (l.c. 135):

> "When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

In that case the Court further said (348 U.S., l.c. 138, 75 S.Ct., l.c. 137):

> "Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty."

IV

In holding the requirement in a circumstantial evidence case "that the necessary exclusion of every reasonable hypothesis other than that of guilt is no longer valid" (Opinion p. 3) the Court brought this opinion into direct and irreconcilable conflict with other opinions of this Court and with the opinions of other circuits throwing the law on this subject into confusion.

In the case of *McMillian* v. *United States*, 5 Cir., 399 F.2d 478, the Court stated the law as follows (l.c. 479):

> "[3-6] The central thrust of the appeal is directed to the sufficiency of the evidence to support the verdict. * * * When the government relies on circumstantial evidence to support a conviction the circumstances must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence. Barnes v. United States, 341 F.2d 189 (5th Cir. 1965). With these principles in mind we have carefully examined the evidence and concluded the convictions are not supported by substantial evidence and must be reversed."

See to like effect *Hamilton* v. *United States*, 5 Cir., 304 F.2d 542, 545.

Since the case of *Holland* v. *United States*, 348 U.S. 121, 75 S.Ct. 127, this Court has six times stated and applied the law as stated in the *McMillian* case as follows: *Sykes* v. *United States*, 312 F.2d 232, 235 (cert. den. 373 U.S. 942); *Wood* v. *United States*, 8 Cir., 342 F.2d 708,

713 (cert. den. 361 U.S. 802), cited in the case of *McClard* v. *United States* at p. 509 of 386 F.2d in footnote 8 to the dissenting opinion of Judge Lay of this Court, and also in the cases of *Conaway* v. *United States*, 8 Cir., 349 F.2d 907, 911 (cert. den. 382 U.S. 976); *Byrth* v. *United States*, 8 Cir., 327 F.2d 917, 919(1) (cert. den. 377 U.S. 931); *Lerma* v. *United States*, 8 Cir., 387 F.2d 187, 188 (cert. den. 391 U.S. 907); *Tri-Angle Club, Inc.* v. *United States*, 8 Cir., 265 F.2d 829, 833(6).

The opinion herein is in direct and irreconcilable conflict with the opinion of the Ninth Circuit in the case of *Hiram* v. *United States*, 9 Cir., 354 F.2d 4; the Court said (l.c. 6):

> "[1-6] As this court recently restated the correct test in determining the sufficiency of the evidence is whether 'reasonable minds could find that the evidence excludes every hypothesis but that of guilt.' Kaplan v. United States, 329 F.2d 561, 563 (9th Cir. 1964)."

See to like effect *Urquidi* v. *United States*, 9 Cir., 371 F.2d 654, 657 (2), (cert. den. 389 U.S. 879).

The case of *Wood* v. *United States*, 8 Cir., 361 F.2d 802, cited at page 3 of the Opinion of this Court herein conforms to the above test. The charge there contained the following (p. 805, 361 F.2d):

> "These circumstances ought to be consistent with each other, with the (Government's) theory * * * and inconsistent with any reasonable hypothesis of the defendant's innocence.
>
> Manifestly, the instruction did not materially depart from the standard we have applied in testing the sufficiency of the evidence."

Cases holding the *Holland* doctrine applies only to instructions are: *Battles* v. *United States*, 5 Cir., 388 F.2d 799,

802(3); and cases cited in footnote 3; *Thurmond* v. *United States*, 5 Cir., 377 F.2d 448; *Thomas* v. *United States*, 9 Cir., 369 F.2d 372, 373.

The part relied upon by this court in its opinion is dictum only. The other cases cited are clearly distinguishable for obvious reasons for which there is no space.

V

In holding that the "attending physician" (he was supervisor over the ward for three days) gave "substantial" evidence that plaintiff's condition on the day in question would not have affected his ability to sign the tax return or "have knowledge of its contents" (Opinion p. 6) the Court overlooked or misunderstood and misapprehended the testimony of such witness. The record clearly shows the doctor had no personal recollection of seeing plaintiff on that morning but checked the record and found he was not marked absent that morning and therefore assumed he was on duty; having assumed he was on duty that morning despite the silence of the hospital records he assumed he must have seen defendant in making his rounds; since there was no entry in the hospital records as to defendant on that morning he further assumed plaintiff must have been improved over the day before. (Appellant's reply brief pp. 10-15) The doctor's testimony was based on inference on inference and instead of proving the fact beyond a reasonable doubt did not arise to the level of substantial and probative evidence. That was the only evidence on that point by the prosecution and is directly contrary to the testimony of defendant and his mother, who was present with him that morning. (A. 356, 357, 375, 388) (Appellant's main brief pp. 26, 32, 8, 9)

In the case of *Gallegos* v. *United States*, 10 Cir., 237 F.2d 694, the Court said (l.c. 698):

"As defendants correctly contend, convictions cannot be based upon a pyramiding of inference on inference or presumption on presumption. Rosenberg v. United States, 10 Cir., 120 F.2d 935."

The opinion herein is in direct conflict with the *Gallegos* case as well as the decision of this Court in the case of *Byrth* v. *United States*, 327 F.2d 917, 920.

VI

In assuming proof that when a check or money is shown to have been given to defendant and lawfully received by him in his official capacity at one time and not later accounted for in the Magistrate Court accounting is sufficient, without further proof that defendant retained same or had the personal use and benefit of such, the court overlooked the fact and failed to mention or consider the stipulation herein that there were six employees of the court (all subordinate public officials) authorized to receive money and checks and give receipts, although this was pointed out in Appellant's main brief Point II, page 14 and 22 inclusive and pages 5 to 9 of Appellant's Reply Brief.

The ruling herein is in conflict with *Rich* v. *Warren*, 6 Cir., 123 F.2d 198, where the court said (l.c. 199):

"We approve Dowler v. Johnson, supra, as did the Eighth Circuit Court of Appeals in Fidelity & Casualty Co. v. Brightman, 53 F.2d 161, 166, where the doctrine was restated: 'It is well-settled law that public officers are not responsible for acts of subordinate officials, if such subordinates are themselves employees of the government, where there is no negligence on the part of such public officials in employing them, unless the superior officer has directed or encouraged or ratified such acts or has personally co-operated therein.'"

The opinion herein is in direct conflict with the previous opinion of this Court in the case of *Tri-Angle Club, Inc.* v. *United States*, 8 Cir., 265 F.2d 829, 832, where several others, as here, had ready access to the funds, and defendant testified to his innocence (A. 376, 377, 392, 393).

As the prosecution produced no evidence whatever that defendant ever appropriated to his own use and benefit one single cent of the missing funds there was a total failure of proof of the crime of embezzlement as charged.

WHEREFORE, Appellant John L. Lodwick, Jr., prays the Court to set aside its opinion and judgment entered herein and grant him a rehearing in this cause.

WALTER A. RAYMOND
KENNETH C. WEST
1030 Commerce Tower
Kansas City, Missouri 64199
Attorneys for Appellant

Walter A. Raymond, of counsel for the above-named Appellant does hereby certify that the foregoing petition for rehearing in the above matter is not filed for vexation or delay, but in good faith; that he and Appellant verily believe this petition is meritorious and that it should be sustained.

WALTER A. RAYMOND

EXHIBIT C.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19442

September Term, 1968

United States of America,
Appellee,

vs.

John L. Lodwick, Jr.,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

It is further ordered that motion of appellee, United States of America, to modify the Court's opinion of May 22, 1969, be, and it is hereby, denied.

June 26, 1969

EXHIBIT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
Kansas City 64106

JOHN W. OLIVER
District Judge

May 23, 1969

Honorable Martin D. Van Oosterhout
Chief Judge
United States Court of Appeals

Honorable M. C. Matthes
Judge
United States Court of Appeals

Honorable Gerald W. Heaney
Judge
United States Court of Appeals

United States Court House
St. Louis, Missouri

In re: United States of America v. John L. Lodwick, Jr., No. 19442.

Dear Judges:

Counsel have directed my attention to Page 2 of the slip opinion in the above case which states that:

> "The court sentenced defendant to five years upon Count I and three years upon Count II under the provisions of 18 U.S.C.A., Section 4208(b). The parties agree the sentences are to be served consecutively."

Counsel who argued this case in the Court of Appeals did not appear in the trial in the District Court. They were therefore unfamiliar with the fact that the two 4208(b) sentences imposed were not in any way to be considered as final sentences. They were likewise unfamiliar with the fact that I expressly refused to indicate that the two 4208(b) sentences were to be concurrent or consecutive. Such a designation, of course, would be meaningless for the reason final sentence could not be imposed until after the study and recommendations of the Director of the Bureau of Prisons was received, assuming that the convictions on both counts were eventually finally affirmed.

The portion of the transcript which reflects that the 4208(b) sentences were imposed in light of the appellate options articulated in *Corey* v. *United States,* 375 U.S. 169, was not included in the record filed in the Court of Appeals.

At the request of counsel I had my court reporter transcribe that portion of the record which establishes that the apparent agreement of counsel who appeared before the Court of Appeals was contrary to the express provisions of Section 4208(b) and to what was expressly stated by the trial court at the time of sentencing.

Copies of this letter were submitted to counsel for their approval before mailing. Both sides have approved and requested that this letter go forward.

Counsel for both sides understand, of course, that I have no more idea now in regard to what would be an appropriate sentence than when I ordered the 4208(b) study.

With best personal regards to each of you,

Sincerely,

JWO:mmf
cc: Calvin K. Hamilton
Walter A. Raymond

EXHIBIT E

UNITED STATES v. JOHN L. LODWICK, JR., No. 22,609

Excerpt from Proceedings on June 21, 1968

THE COURT: Now, I am also advised, both by counsel and advised by the Probation Officer, that the defendant has indicated definitely that an appeal would be taken from the ultimate judgment of this Court if that judgment sustains the verdict of guilty and if the Court should overrule post-trial motions which are scheduled for filing in my order of June 3, 1968.

I assume that there has been no change in the desire, and very proper desire, of the defendant to have an appellate review of the proceedings in this Court. Has there been any change of intention, Mr. Lodwick, of the probability of appeal in the event post-trial motions are not successful?

THE DEFENDANT: I am not sure that we have actually made up our minds.

MR. MORRIS: We have not decided determination on that as yet, Your Honor.

THE COURT: Well, in a case in 1963 and in other cases, I had a situation not dissimilar from this, and I think perhaps that the same statement could be made in this case as was made then.

I stated then that counsel for the defendant have indicated at least a likelihood of an appeal in this case. Would that be a fair statement as far as your present situation?

MR. MORRIS: Yes, Your Honor.

THE COURT: I also suggested in that case and in other cases that the right of appeal in this or in any other case is a valuable right, and the fact that such a right is

exercised should in my judgment be considered in connection with whether what we would do today so far as imposition of sentence is concerned would reflect our judgment of justice as to what we would or should do after all appellate proceedings are exhausted.

Now, so far as this case is concerned, we must not overlook the fact that there is pending cases against this defendant in the State courts. The defendant advised the Probation Officer that he feels that the Federal Government had interjected itself into a matter that should rightfully have been handled solely by the State.

I think it should be said that we are not particularly impressed with the idea that there is competition between State and Federal jurisdictions for the prosecution of alleged offenses against the respective laws of the State of Missouri and the United States.

It is this Court's view that a defendant charged in either jurisdiction is entitled under the Constitution to a speedy and a fair trial and that the administration of criminal justice must go forward with vigor and with fairness, else the public comes to believe that a particular individual is somehow above the law and is treated differently than other persons.

It seems to me that we must recognize in this case as we have recognized in other cases that what happens between the termination of proceedings in the trial court and what the situation will be as far as sentence in the event a conviction is affirmed, is of real importance as far as the ultimate sentence that should justly be imposed in a particular case.

In the 1963 case to which I made reference, I suggested that putting all these factors in balance, it is the determination of this Court that a judgment of conviction be entered and that the defendant be committed to the custody of the

Attorney General pursuant to the provisions of Section 4208(b) of Title 18 of the United States Code.

I explained to the defendant in that case, as I do in this, that this particular provision of the United States Statutes provides that the Court's commitment of the defendant to the custody of the Attorney General shall be deemed for the maximum sentence of imprisonment for a study and a report by the Director of the Bureau of Prisons who will make recommendations to this Court for ultimate disposition of this case.

I pointed out that the Court may or may not follow, it being a matter of the Court's discretion, any recommendations made by the Director. I suggested that every Court, or at least this Court, desires to have before it all available pertinent information to aid it in its discharge of its awesome duty of sentence.

I also suggested and I think it is applicable to this case that whether the sentence imposed here today, which under the law must be deemed to be the maximum sentence, should ultimately be affirmed or reduced or whether some other applicable provision of law should then be utilized can in my judgment be determined better at the end of all appellate proceedings than it can be now.

I indicated, therefore, in that case, as I indicate in this case, that the Court will sign an appropriate order entering a judgment of conviction and utilizing the provisions of Section 4208(b) of Title 18 of the United States Code.

Now, at the time sentence was imposed in 1963 the Supreme Court of the United States had not definitively passed upon the question as to when an appeal could be taken. There was a conflict between the First Circuit and the Seventh, as I recall, and this Court had to make a judgment as to which way the Supreme Court of the United States was going to go.

In the case of *Corey* v. *United States*, 375 U.S. 169, decided a few months after I imposed sentence in the case to which I made reference, the Supreme Court followed the First Circuit's construction of 4208(b) in accordance with the manner in which this Court had read that section and established as the law of the land that under the provisions of Section 4208(b) the trial judge imposes a sentence of imprisonment deemed to be the maximum prescribed by law and then sets forth the recommendation back.

As far as the appellate problem was concerned, the Supreme Court held, and I quote: "That problem, simply stated, is how, in cases where trial judges have utilized the sentencing provisions authorized by 18 U.S.C. Section 4208(b), the rules governing criminal appeals are to be applied so as neither to frustrate their purpose nor to impair the efficacy of the flexible sentencing procedure which Congress devised in enacting 18 U.S.C., Section 4208(b).

"We have concluded," the Supreme Court held, "that in such cases an appeal may be taken within the time provided by Rule 37 (a) (2), Federal Rules of Criminal Procedure, after either the first or the second sentence under Section 4208 (b), at the option of the convicted defendant."

So the option open here is that an appeal may be taken either prior to the actual custody of the Attorney General or before that custody, and in that connection I wish to advise the defendant pursuant to Rule 32 (a) (2) of his right of appeal.

The sentence of this Court will be on both counts in order that full appellate review of both counts can be had. The sentence on Count I carrying a maximum sentence of five years will be imposed under Section 4208 (b).

MR. HAMILTON: What about the fine provision?

THE COURT: I am going to suspend any imposition of fine, because I need not do so, but I want the record to expressly show that I am not doing more than merely deferring the imposition of fine on the two counts involved.

A similar sentence will be imposed on—is the maximum on 7201 five years, Mr. Hamilton?

MR. HAMILTON: Yes, sir, five years.

THE COURT: I thought there was an amendment on that. Count II, the maximum sentence is three years?

MR. HAMILTON: Yes, sir.

THE COURT: That will be under 4208(b) also so that full appellate rights are preserved in connection with both sentences. I need not indicate whether those sentences are concurrent or consecutive because ultimate sentence will not be imposed until after the report back from the Director or in the event the judgment of this Court is affirmed.

Now, pursuant to Rule 32 (a) (2), which reads as follows, and the reading of it will advise the defendant of his rights, that portion of Rule 32 relating to the notification of right to appeal, and it provides that after imposing sentence in a case which has gone to trial on a plea of not guilty, the Court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal *in forma pauperis*; if the defendant so requests the Clerk of the Court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

I would assume, but I want to check, that in light of the order of June 3 regulating the filing of post-trial motions, that the defendant does not want an appeal entered as of this time. Is my impression correct?

MR. MORRIS: That is right.

THE COURT: You understand you have a right to appeal at this time and I would order it entered if you cared to have it done.

MR. MORRIS: We would like to have the motion for new trial and the motion in arrest of judgment which will be filed ruled upon and—

THE COURT: Your time for appeal would run from the denial of those motions if those motions are denied.

MR. MORRIS: That is right, the custody of the defendant deferred until that time.

THE COURT: That is right. Now, in light of the sentence, the ultimate sentence in this case will follow the receipt by the Court of the study of the Director of the Bureau of Prisons and its recommendation.

The present sentence, of course, under 4208(b) will follow the same procedure, if affirmed, of all (b) sentences that are imposed by this Court.

Counsel for either party have anything further in connection with this case?

MR. HAMILTON: Yes, sir, Your Honor. I believe at this juncture, it would be that the previous bond has served its purpose, no longer can be considered in existence. I think it is appropriate at this time and necessary to fix an appeal bond.

THE COURT: Well, appeal has not been indicated. I think when we get to that point we will take that matter up. I will continue the present bond and determine the question if and when an appeal is filed.

Is that satisfactory to both parties?

MR. MORRIS: Yes.

MR. HAMILTON: It is satisfactory but—

THE COURT: Well, we don't have an appeal yet. We have merely an anticipated appeal.

Anything further from either party?

Very well.

EXHIBIT F

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,442

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN L. LODWICK, JR.,
Appellant.

MOTION ON BEHALF OF UNITED STATES OF AMERICA TO MODIFY OPINION

On May 22, 1969, this Court filed an opinion in this case which concludes as follows:

> "The conviction and sentence on Count I is affirmed. The Court erred in sentencing defendant on Count II. This case is remanded to the District Court with direction to vacate the sentence imposed upon Count II.
>
> Affirmed on Count I; reversed and remanded on Count II."

In the last sentence of the first paragraph on page 2 of the slip opinion, it is stated, "The parties agree the sentences are to be served consecutively."

Section 4208(b), Title 18, United States Code, provides:

> "If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section."

It is clear from reading Section 4208(b) that it does not contemplate a determination at the time of the imposition of a tentative sentence pursuant to that section as to whether sentences will be consecutive or concurrent. In fact, it would not be practical to attempt to impose consecutive sentences in the utilization of Section 4208(b). To do so would mean that the Director would make a study during the first three (3) months on the first count and then would make a second study for an additional three (3) months on the second count.

The sentence imposed by Judge Oliver on June 21, 1968, was as follows:

> "IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for what shall be deemed to be the maximum period of five (5) years on Count 1 and three (3) years on Count 2, both sentences being imposed pursuant to Section 4208(b), Title 18, United States Code, for study of the defendant as therein provided, with report to be made to this Court within three (3) months, unless otherwise extended. Imposition of a fine or costs on either or both counts is deferred at this time" (R. 63-64; Pages 3-4, 6 of Excerpt of Proceedings of June 21, 1968, which was enclosed with Judge Oliver's letter of May 23, 1968, and which is incorporated as a part of the record by appellant on page 2 of his petition for rehearing).

Nowhere in the judgment and commitment is there any mention of the sentences being consecutive and in imposing sentence Judge Oliver specifically stated, "I need not indicate whether those sentences are concurrent or consecutive because ultimate sentence will not be imposed until after the report back from the Director or in the event the judgment of this Court is affirmed" (Page 6 of Excerpt from Proceedings of June 21, 1968). Therefore, counsel, neither of them was present on June 21, 1968, when sentence was imposed, were mistaken in agreeing that the sentences imposed on Counts I and II were to run consecutively.

As mentioned hereinabove, a sentence imposed pursuant to Section 4208(b) is wholly tentative. The final decision as to what the sentence will be is made after the trial court has had the benefit of the report and recommendation of the Director of the Bureau of Prisons. *United States* v. *Behrens*, 375 U.S. 162, 164-165 (1963); *Corey* v. *United States*, 375 U.S. 169, 172 (1963). However, a defendant may appeal from the sentence imposed pursuant to Section 4208(b), as appellant chose to do in this case, or he may wait and appeal from the final sentence. *Corey* v. *United States*, supra.

This Court held correctly that the Court should have submitted both Counts I and II to the jury and that it was proper for the jury to find Lodwick guilty on both counts (Page 7 of slip opinion).

For the foregoing reason, it is submitted that the opinion filed May 22, 1969, should be modified by deleting the first two (2) paragraphs on page 8 and inserting in lieu thereof, the following:

"The convictions on Count I and Count II are affirmed."

/s/ Calvin K. Hamilton
United States Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing motion to modify opinion was mailed this 9th day of June, 1969, to Walter A. Raymond, 1030 Commerce Tower, 911 Main Street, Kansas City, Missouri 64199, and to Harry A. Morris, 1200 City National Bank Building, 928 Grand, Kansas City, Missouri 64106, attorneys for appellant.

/s/ Calvin K. Hamilton
United States Attorney

EXHIBIT G

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT H

26 U.S.C., § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

EXHIBIT I

26 U.S.C., § 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully make and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

EXHIBIT J

R.S. Mo. 1959, § 549.111. Absolute discharge of person on probation or parole—citizenship restored—order of discharge to indicate restoration of rights

1. When a defendant who has been placed upon probation or parole for the term prescribed by the court, and

the court granting the probation or parole is satisfied that the reformation of the defendant is complete and that he will not again violate the law, the court shall, by order of record, grant his absolute discharge. When a defendant has completed the term of probation prescribed by the court, if the original order of probation has not been amended, modified, extended or revoked by the court, he shall automatically be absolutely discharged from the probation and from the supervision of the board of probation and parole and the court shall so note by order of record. The order operates as a complete satisfaction of the original judgment by which the fine or jail sentence or commitment to the state department of corrections was imposed or suspended.

2. Any defendant who receives his final discharge under sections 549.058 to 549.161 shall be restored all the rights and privileges of citizenship. The court granting the final discharge shall supply the defendant with a copy of the order terminating probation, which shall clearly indicate that all the rights and privileges of citizenship have been restored. The court shall also send a copy of the order of final discharge to the board of probation and parole if the defendant has been under the supervision of the board. Added Laws 1963, p. 671, § A(§ 7), as amended Laws 1967, p.—,S.B.No.247, § 1.

EXHIBIT K

R.S. Mo. 1959, § 549.193. Paroles by magistrates in misdemeanor cases—generally

In all counties except counties of the first class having a charter form of government, every magistrate shall have those powers granted to a circuit court in a county in which there is no parole board, to parole any person, or to

place any person on probation, or to suspend or stay any fine or sentence, or any part thereof of imprisonment imposed on any person, on such conditions as the magistrate may consider reasonable and just, but only as to persons convicted before him or in his court of a violation of the criminal laws of this state, or of a violation of any county ordinance, or of any other offense for which trial may be had before him. At any time thereafter, and during such parole, probation, suspension or stay, the magistrate shall have those powers granted to a circuit court in a county in which there is no parole board to terminate or revoke any such parole, probation, suspension, or stay, in whole or in part, but only as to a parole, probation, suspension or stay adjudged by him or in his court. Laws 1955, p. 516, § 1.

EXHIBIT L

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EXHIBIT M

SECTION 50.350, R.S. Mo. 1959

50.350. Salaried officer to collect fees (class two counties)

1. It shall be the duty of every county officer, in all counties of the second class, who shall be paid an annual salary in lieu of all fees, penalties, commissions, charges, emoluments, and moneys due him or his office for any service performed, to charge, collect and receive, upon behalf of the county, every fee, penalty, commission, charge, emolument and money that accrues in his office for any service rendered, by virtue of any statute of this state, except such fees as are chargeable to the county.

2. Subsection 1 shall not be construed to prohibit the retention of the commission allowed to the collector in counties having less than one hundred thousand inhabitants for collection of levee and drainage district taxes as provided in section 52.275, RSMo. (L.1945 p. 1564 § 1; L.1961 p. 281 § 1)

Mo.R.S.A. § 13547.217.

EXHIBIT N

SECTION 57.360, R.S. Mo. 1959

50.360. Pay money to county treasurer—monthly report concerning paid and unpaid fees—duty of county court

Every such officer shall, at the end of each month, pay over to the country treasury all moneys collected by him from the above sources. He shall take two receipts therefor, and one of such receipts, he shall file immediately with

the county court. He shall also, at the end of each month, make out an itemized and accurate list of fees, penalties, commissions, charges, emoluments, and moneys accruing in his office for services rendered, which have been collected by him, and one of all fees, penalties, commissions, charges, emoluments, and moneys accruing in his office for services rendered, which have not been collected, giving in both instances, the name or names of the person or persons paying or owing the same, and stating, with reference to any money uncollected, that he has been unable, after the exercise of due diligence, to make collection thereof. The aforesaid itemized list shall be signed by the officer and verified by his affidavit, and filed with the county court, and such officer shall be liable on his official bond for all money collected and not accounted for and paid into the county treasury as herein provided. It shall be the duty of the county court to cause any money, shown by the officer's report to be due and unpaid, to be collected by law, and the same, when collected, to be paid into the county treasury. (L.1945, p. 1564 § 2)

Mo.R.S.A. § 13547.218.

Library references: Counties (key) SO: C.J.S. Counties § 147 et seq.

EXHIBIT O

SECTION 57.380, R.S. Mo. 1959

57.380. Collection of fees in civil and criminal matters, disposition (class two counties)

The sheriff in all counties of the second class shall charge, collect and receive, on behalf of the county, every fee, penalty, charge, commission and other money that ac-

crues to him or his office for official services rendered in civil and criminal matters, by virtue of any statute of this state, and all the fees, penalties, charges, commissions, and other money collected by him, shall at the end of each month be paid by him to the county treasurer, as provided in section 50.360, RSMo, less that amount of fees from civil matters which he is authorized to retain by section 57.340. He is not entitled to collect the per diem allowed to the sheriff as a member of the board of equalization and board of appeals, as provided in section 138.020, RSMo. (L.1945 p. 1269 § 4; L. 1959 S.B.No. 68 § 1)

Mo.R.S.A. § 13547.204.

EXHIBIT P

SECTION 57.130, R.S. Mo. 1959

57.130. To collect fines, penalties and forfeitures

The sheriffs of the several counties shall collect and account for all the fines, penalties, forfeitures and other sums of money, by whatever name designated, accruing to the state or any county in virtue of any order, judgment or decree of a court of record. (R.S. 1939 § 11221)

Former Revisions. 1929, § 9990; 1919, § 12980; 1909, § 11532; 1899, § 9233; 1889, § 7613.

EXHIBIT Q

SECTION 55.240, R.S. Mo. 1959

55.240. Sheriff to make monthly report to auditor (class two counties)

The sheriff of all such counties shall on the last secular day of each month make out and file with the auditor a

full and complete statement of all fines and forfeitures by him collected, stating therein from whom and when collected, the amount thereof, and on what account; and he shall file with such statement a receipt showing to whom he has paid the same; he shall also at the same time file with the auditor a receipt for any and all moneys and fees paid by him to any officer whose duty it is to make settlement with the county court, and whose duty it is to report to the auditor the receipts and expenditures of his office. (R.S. 1939, § 13875)

Former Revisions. 1929, § 12212; 1919, § 9610; 1909, § 3831.

EXHIBIT R

"560.156. Stealing—elements of offense

* * *

(2) *'Steal'*, to appropriate by exercising dominion over property in a manner inconsistent with the rights of the owner, either by taking, obtaining, using, transferring, concealing or retaining possession of his property."

EXHIBIT S

"560.161. Penalties for stealing—fourth offense

* * *

(2) If the value of the property stolen is at least fifty dollars, by imprisonment in the penitentiary for not more than ten years nor less than two years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 405

JOHN L. LODWICK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1969. On June 26, 1969, the court of appeals denied petitioner's petition for rehearing (Pet. App. A19). On July 28, 1969, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to August 25, 1969, and the instant petition was filed on July 29, 1969.

QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper legal standard in reviewing the sufficiency of the circumstantial evidence to support the jury's verdict of guilty.

2. Whether the evidence adequately showed that petitioner's mental condition was consistent with a finding of wilfulness.

STATEMENT

After a jury trial, petitioner was convicted of attempting to evade his income taxes for 1961 by filing a tax return wherein he reported taxable income of $7,257.17 for salary, dividends, interest and capital gain (A. 6, 60, 63, 439).[1] The government introduced evidence to establish that during 1961 petitioner received additional income of $6,625 from fifteen criminal fines imposed by petitioner on defendants who appeared before him in Magistrate Court (A. 233-234). Of this amount, a total of $2,875 was paid to and received by petitioner in currency (A. 106, 121, 125-128, 133, 137, 150, 195, 198, 204, 585). An additional $3,400 was paid by checks (and one money order), all of which were endorsed by petitioner and thereafter cashed at various banks (A. 109-110, 122-123, 230-231, 515-520, 523-524, 526, 528-529, 573), except that two of such checks totalling $650 were deposited by petitioner in a spe-

[1] "A." references are to the three-volume joint appendix in the court of appeals.

cial account which, petitioner testified, he opened as a depository for two specific fines totalling $1,000 so that the fines could be easily refunded when the defendants successfully completed their terms of paroled sentences (A. 122-123, 288-294, 368-369, 380-381). Petitioner testified that, to his knowledge, no refunds of these sums were made (A. 381). Clerks who served in petitioner's court denied any knowledge of this special account (A. 169, 183, 220), which was closed out by a check signed with petitioner's name but of which petitioner denied execution, knowledge, or benefit (A. 376, 381-382, 392-393, 566, 568).

The fines involved were not included in the monthly disbursement checks to the County Treasurer (A. 174-180), although the costs imposed in these cases were accounted for on the customary fee sheets and disbursed to the Sheriff, County Prosecutor, and Director of Revenue (A. 448, 449; 577, 578; 583, 584; 569, 570; 452, 453; 586, 587; 589, 590; 468, 469; 450, 451, 571; 455, 456; 465, 466; 459, 574; 462, 463).

Petitioner denied personally receiving any of the fines involved and testified that he endorsed the checks as a way of signifying to his clerks that he approved acceptance of the check in payment of the fines (A. 371, 375, 393). Office clerks testified that petitioner signified orally his approval of checks and that all checks received were deposited in the Magistrate Court bank accounts after being endorsed with a rubber stamp (A. 161-162, 227), and they denied cashing any of the checks (A. 180-182, 216, 226).

Petitioner testified that he signed a 1961 tax return, which was prepared for him by his brother, while he was undergoing hospitalization to cure a reaction from cortisone medication taken over a period of years and that he did not specifically recall signing the return (A. 373-375). His mother testified that he seemed "confused" and uninterested in what he was signing (A. 356-357), and other defense witnesses testified that he appeared "emotionally upset" (A. 353) or "distraught" (A. 327) at the time. The attending hospital physician testified that he noted no lack of understanding or mental confusion on petitioner's part, that his mental condition and conversational responses were normal although he was a sick man, and that his situation was not such as to affect his knowledge of signing a tax return (A. 404-414).

ARGUMENT

1. There is no merit to petitioner's multifarious points (Pet. 15-30) contesting the sufficiency of the circumstantial evidence introduced against him. Both the trial court (A. 89, 235, 415) and the court of appeals (Pet. App. A3-A6) concurred with the jury verdict, and, in these circumstances, it would normally be regarded as conclusive. *United States* v. *Johnson*, 319 U.S. 503, 518.

Petitioner's contention that, in evaluating the sufficiency of the evidence by a "substantial evidence" test, the court of appeals misapplied *Holland* v. *United States*, 348 U.S. 121, 139-140, is without substance. In *Holland* this Court rejected the premise

that there is an intrinsic probative difference between circumstantial and direct evidence. The jury in this case was given a thorough instruction on the reasonable doubt standard with respect to circumstantial evidence (A. 424). If, as stated in *Holland*, the test for the jury to apply is "reasonable doubt," it would be anomalous to apply the "exclusive hypothesis" standard to appellate review. In various circumstantial evidence cases, this Court has repeatedly confirmed that a motion for acquittal at the close of a case raises a question of law "which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 254. See also *Glasser* v. *United States*, 315 U.S. 60, 80; *Gorin* v. *United States*, 312 U.S. 19, 32; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787.[2] That is precisely the approach taken by the courts below here, and further review is thus not warranted.

2. Petitioner's defense of emotional illness was not pleaded on the basis of insanity but rather in regard to the issue of wilfulness (A. 361-362), much like the "psychological disturbance, amounting to

[2] The Fifth Circuit's adherence to a special rule for circumstantial evidence is not a conflict which calls for resolution in the face of the clear exposition of the matter by this Court in *Holland*. While petitioner also cites (Pet. 28-29) the Third and Ninth Circuits as in accord with the Fifth Circuit, the latter court views them as opposed to its view. *Battles* v. *United States*, 388 F. 2d 799, 802, n. 3 (C.A. 5).

something more than worry but something less than insanity," which was considered in *Spies* v. *United States*, 317 U.S. 492, 493. As noted by the court of appeals (Pet. App. A5-A6), this issue was submitted to the jury without objection by petitioner on an instruction (A. 433) which was adapted by the trial court (A. 339, 419) from *United States* v. *Gorman*, 393 F. 2d 209 (C.A. 7), certiorari denied, 393 U.S. 832. Petitioner apparently does not contend (see Pet. 30-33), however, that any special test for circumstantial evidence should apply to this issue. Here, moreover, the proof on this issue consisted solely of direct evidence. At all events, the court of appeals was correct (Pet. App. A6) in noting that the jury finding of a criminal intent has a "substantial evidentiary basis."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

AUGUST 1969.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 405

JOHN L. LODWICK, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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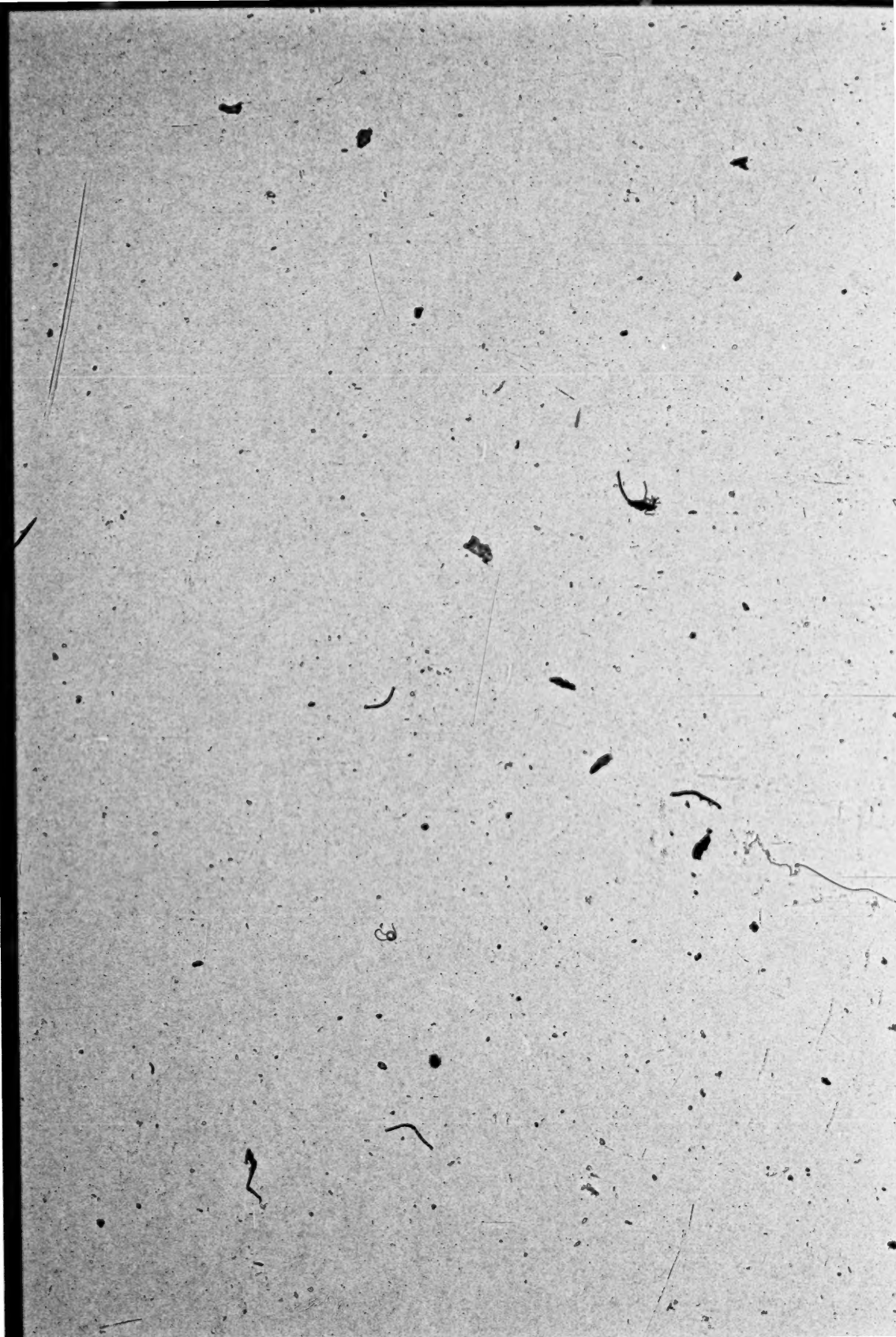

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SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

The Government makes an ostrich type approach to the issues herein by figuratively hiding its head in the sand in the belief they will go away. The Government assumes the position of being entirely satisfied and complacent with the various conflicting applications of the case of *Holland* v. *United States*, 348 U. S. 121, 139-140, by the different Circuits, with the Fifth, Ninth and Third

Circuits holding contrary to the decision of the Eighth Circuit herein and confusion in the Eighth Circuit with five decisions of that Court in accord with the present decision and eight decisions contrary thereto and in accord with the Fifth, Ninth and Third Circuits (Pet. pp. 28, 29).

In the light of the announced program of the Government to move rapidly forward with progressive procedural reforms to expedite the administration of justice we had reason to expect help from the Government in clearing up this conflict and confusion which call for so much time and effort of the various United States Courts of Appeal and Counsel for the Government as well as counsel for the private litigants, all of which can be resolved by the judgment of this court.

In the case of *Riggs* v. *United States*, 5 Cir., 280 F. 2d 949, the Court pointed out the conflict between the Circuits on the "Second Circuit Doctrine," adopted by the opinion herein, and the Opposing doctrine which we here urge, saying (280 F. 2d, l. c. 954):

> "As said, again by Judge Learned Hand, in United States v. Andolschek, 2 Cir., 1944, 142 F. 2d 503, 505: 'The accused at bar do not argue that the evidence was not strong enough to support a verdict in a civil case, and it certainly was; that being true, our review ends.' The question was further discussed at length by that Circuit in still later opinions, in United States v. Costello, 2 Cir., 1955, 221 F. 2d 668, 671, in United States v. Gonzales Castro, 2 Cir., 1956, 228 F. 2d 807, and in United States v. Masiello, 2 Cir., 1956, 235 F. 2d 279. In powerful dissents in the last two cases, Judge Frank termed this ruling the 'Second Circuit doctrine' (235 F. 2d 288) to distinguish it from cases which he cited to show that a contrary doctrine prevailed in the Third, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits. See footnote 4, 228 F. 2d 809, and footnote 12, 235 F. 2d 291. See also footnote 3, 221 F. 2d 680."

The Government does not undertake to deny this conflict and confusion but seeks to disengage itself from the controversy by treating it as inconsequential and trying to brush it aside.

> On page 5 of its brief the Government states: "In various circumstantial evidence cases, this Court has repeatedly confirmed that a motion for acquittal at the close of a case raises a question of law 'which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict.'" * * * "That is precisely the approach taken by the courts below here, and further review is thus not warranted."

That statement merely begs the question instead of answering it. We challenge that statement. That is not "precisely the approach taken by the Courts below" as demonstrated by the fifteen United States Circuit Court of Appeals cases cited on pages 28 and 29 of this Petition holding, "the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt."

The test as to whether a submissible case is made is not merely "whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict" (page 5, Government Brief) but "the test to be applied is whether the jury might reasonably find the evidence excluded every reasonable hypothesis except that of guilt." (*Riggs* v. *United States*, 280 F. 2d, l. c. 955)

> "The position of the Fifth Circuit becomes even clearer when we consider that, as a practical aid to its review of the sufficiency of the evidence to justify a finding of guilt beyond a reasonable doubt in cir-

cumstantial evidence cases, '* * * this court has without wavering declared that the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt, and equally without wavering has applied it.' Panci v. United States, 1958, 256 F. 2d 308, 312.[7]

The Government insists that the legal principle announced in the cases just cited has been rejected by the Supreme Court in the case of Holland v. United States, 1954, 348 U. S. 121, 139-140, 75 S. Ct. 127, 99 L. Ed. 150. However, this Court has ruled to the contrary in a case decided since the present case was argued and submitted. Cuthbert and Busby v. United States, 5 Cir., 1960, 278 F. 2d 220. It was there pointed out that nothing said in the Holland case, or in the authorities cited in that case, is at all inconsistent with the test to be applied in circumstantial evidence cases on motion for judgment of acquittal and on review of the denial of such motion as to whether the inferences reasonably to be drawn from the evidence were not only consistent with guilt of the accused but inconsistent with every reasonable hypothesis of his innocence.

It seems to us that the Supreme Court itself is not in accord with the 'Second Circuit doctrine' but is in accord with that prevailing in this Circuit and in other circuits."

The Government likewise glosses over the fact the evidence in this case does not show Petitioner ever received personally or had the personal benefit of a single dollar of the missing funds while there were six employees of the magistrate court handling its money during the period. The Courts below erred in adopting the shifting burden of proof rule used in "net worth cases." The prosecution satisfied itself with proving that Petitioner at one time had this money in his possession lawfully in

his official capacity as judge of the Magistrate Court, that the funds did not get into the County Treasurer's hands and that made a prima facie case shifting the burden of evidence to Petitioner. The Courts below adopted that erroneous theory.

The Government also ignores the fact its representatives were given 16 specific leads which it did not follow up and report on (A Vol. I, p. 222).

The Government not only did not trace a single dollar into Petitioner's personal use but made no attempt to show an increase of Petitioner's assets over the period such as is required in a "net worth case."

In a "net worth case" the Government is required to establish with reasonable certainty the taxpayer's net worth at the beginning of the period and that the taxpayer's increase in net assets for the year, plus his non-deductible expenditures, are greater than the income shown on his return. Furthermore when the taxpayer supplies the Government leads (A Vol. I, p. 222) the failure of the Government to investigate allows the Court to treat the leads as valid. *Holland* v. *United States*, 348 U. S. 121.

Here the Government did not attempt to prove Petitioner's net worth at the beginning of the period or prove any increase in net assets for the year and did not follow his leads. It wholly failed to show one single dollar of the missing money personally benefited Petitioner. This constituted a total failure of proof that Petitioner retained any taxable income during the year which was not reported. As there was here no proven deficiency in Petitioner's income taxes, it seems there can be no fraud and the charge here was unproven.

As to the serious issue of whether the Government carried its burden to produce evidence to justify a jury in finding beyond a reasonable doubt that at the time Petitioner signed the income tax return in the Mayo Hospital he had the necessary cognition, volition and capacity to make him criminally liable for signing the tax return, prepared by another and not even read by him, the Government claims "the proof on this issue consisted solely of direct evidence." (Govt. Br. p. 6).

We challenge that statement. Dr. Perry was the only witness for the Government on this issue. He had no recollection of seeing Petitioner on the morning he signed his income tax return. He checked the hospital records and found he was not marked absent on that day and so assumed he must have been on duty that day (A. 407). Assuming he was on duty that day he must have seen Petitioner while making his daily rounds (A. 407). As there was no notation in the hospital records for that day as to Petitioner's condition he assumed Petitioner must have been improved or his condition must have been improved (A. 406, 407).

We submit that is not only not "direct evidence" but no evidence at all but an unlawful pyramiding of inference on inference in violation of the rules of evidence.

In the case of *Steele* v. *Woods*, Mo. Sup., 327 S. W. 2d 187, the Court said (l. c. 197):

> "[15, 16] Of course testimony which in and of itself exposes the lack of knowledge on the part of the witness or shows that it is founded on mere guess must fall of its own weight."[18]

For all the reasons set forth in the Petition for Certiorari herein, the supporting suggestions and exhibits and this reply brief, we respectfully ask that the Writ of

Certiorari prayed for herein be issued and upon a hearing this conviction be reversed.

Respectfully submitted,

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